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The Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 540

G. E. MYERS, Trustee of the estate of Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store,
Petitioner and Appellant below,

vs.

VERNA MAY MATLEY,
Respondent and Appellee below.

RESPONDENT'S BRIEF

on Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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To the Supreme Court of the United States and to the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

OPINIONS DELIVERED IN COURTS BELOW

One opinion was delivered by the United States District Court for the State of Nevada. It was written by District Judge Frank H. Norcross, former Chief

Justice of the State of Nevada, and entered November 25, 1941. The opinion was not reported but is set forth at page 44 of the Record.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (Circuit Judges Garrecht, Denman, and Healy, Judge Healy writing; Judge Denman dissenting) was entered on September 15, 1942. The opinion is set forth at page 66 of the record and is reported in 130 Fed. (2nd) 775. The Circuit Court denied a rehearing October 26, 1942 (R. 86).

JURISDICTION

The jurisdiction of the United States Supreme Court is sought to be invoked under Section 24c of the Bankruptcy Act and under Section 240a of the Judicial Code, 28 U. S. C. A. 347.

PRELIMINARY STATEMENT

The petitioner has not filed any brief in this matter as required by Rule 27 of this court. Therefore, respondent's brief will, of necessity, be directed to the points raised in the petition for certiorari and in the Circuit Court of Appeals for the Ninth Circuit.

STATEMENT OF FACTS

The matter was heard before the Circuit Court on appellant's statement of facts (R. 51). The facts set forth in the petition at page 8 are correct but incomplete. The following facts should be noted and are essential to consideration of the question involved whether it be as stated by petitioner or as stated by respondent.

The bankrupt and his wife at all times considered the property to be their home, (R. 53, 55, 67). The wife was residing on the premises at the time of the filing of the bankruptcy, (R. 54). The District Court of the State of Nevada (R. 55) recognized the premises as having been the homestead of bankrupt and his wife for several years. (Petitioner herein was not a party to the suit nor were the respective rights of petitioner and respondent litigated therein.) The bankrupt was guilty of extreme cruelty toward his wife, (R. 54). The adjudication of bankruptcy was consented to by the bankrupt the day the petition was filed, (R. 51). Although the property was considered as their home for several years, the bankrupt made no claim for exemption of the homestead (R. 7, 52). The wife filed the formal declaration of homestead (R. 54) and claimed the homestead exemption in the bankruptcy proceedings (R. 7).

The additional facts included in the respondent's statement of the question and those added to the Statement of Facts are necessary as they present a factual situation under which the Nevada law affords a protection to the wife which is lacking in many other jurisdictions. The Nevada law, and it alone, determines the exemption (Section 6, Bankruptcy Act, 11 U. S. C. A. 24).

QUESTION PRESENTED

The Circuit Court stated the question as follows (R. 67):

> "The question before us is whether, in light of the fact that the homestead declaration was not filed until after the filing of the bankruptcy petition, the wife is entitled to have the property excluded as exempt."

Petitioner had similarly stated the question in his appeal to the Circuit Court (R. 57).

The Question presented as now set forth by petitioner (page 3, petition for writ) is not adequate as it refers to section 70a of the Bankruptcy Act and omits reference to other sections of the Act (e.g. 6 and 7a (8), 11 U. S. C A. 24 and 25) considered and relied on below and omits certain relevant facts. It is likewise faulty in that it implies that the Circuit Court's decision rests necessarily on its interpretation of Section 70a. (See opinion at R. 72.)

The question may, without unnecessary listing of sections of the Act, be stated as follows:

Whether, under the statutes, decisions and policy of the State of Nevada, in light of the fact that the formal homestead declaration was not filed until after the filing of the bankruptcy petition, the wife of the bankrupt is entitled to have the property excluded as exempt, the property having been considered by the parties for several years as their home and having been used and claimed by the claimant as a homestead at the time of the filing of the bankruptcy petition, and a timely claim of exemption having been made in the bankruptcy pro-

ceedings by the wife, the bankrupt having failed to take any action in the proceedings to designate the property as exempt property or to protect such interest as the wife had therein.

The question may also be stated as follows:

Whether, in Nevada, a wife can protect her homestead rights by making a timely claim in a bankruptcy proceeding against her husband for recognition of her homestead exemption and to identify it so as to have it excluded as exempt, where no formal declaration of homestead was filed prior to her husband's bankruptcy and where the wife was residing on the premises and claiming it as her homestead at the time of the filing of the bankruptcy petition and where the husband wilfully failed to take any action to protect such interest as the wife had.

STATUTES

The relevant provisions of the Nevada Constitution and statutes are set forth in the Appendix. Relevant provisions of the Bankruptcy Act and of states other than Nevada are set forth in the Appendix at the end of this brief. Section 8846 Nevada Compiled Laws, 1929, is also set forth therein.

ARGUMENT

A. Correction of Statements as to Circuit Court's Holding

In number I of "Petitioner's Reasons Relied on for the Issuance of the Writ" at page 4, and in the "Specification of Errors" at pages 9 and 10, petitioner in-

correctly states the holding of the Circuit Court, in that it implies a conflict, which, under a correct statement of the holding of the Circuit Court, is non-existent. (In no way, of course, do we intend to suggest that there is any intentional mis-statement of the Circuit Court's holding.)

At page 4, as one of the reasons for issuance of the Writ, petitioner represents that the Circuit Court held that the 1938 amendment to Section 70a relaxed the rule of *White v. Stump*:

> —"and permitted a bankrupt to establish a right of exemption after the filing of the petition in bankruptcy."

Also, at page 9 in the Specification of Errors, petitioner states that the Court held that the amendment relaxed that rule—

> "by permitting a bankrupt to establish a right of exemption which was not complete at the time of the filing of the petition in bankruptcy,".

Also, the second specification of error states that the Court held:

> —"that the right of a homestead exemption could be perfected after the filing of a petition in bankruptcy."

The Court did not so hold. The Court stated (R. 71):

> "We entertain no doubt that now, as heretofore, the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; but there is no good reason for believing that under present law the opportunity to identify or select exempt property is irretrievably cut off as of that date."

Throughout the opinion (e.g. R. 68, 71, 74, 75), the Circuit Court recognizes and points out that under the Nevada law the exemption and exemption right exist even though the same might be lost by execution sale if the property were not identified or selected.

Such incorrect statement of the Circuit Court's holding just pointed out is repeated and made the fundamental basis of petitioner's argument on pages 12 to 19 of his brief which accompanied his petition.

At pages 9 and 10 under the second specification of error, it is stated that the Circuit Court held

> —"that the property in question could not have been sold by execution creditors on the date of the filing of the petition in bankruptcy;"

The Court did not so hold. It stated (R. 74):

> "Until the selection is made—and there is often no statutory machinery for making it—the exemption statute is as a matter of practical necessity no impediment to levy and sale;"

The Court also stated (R. 68):

> "Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt."

At page 10 it is stated that the Court refused to consider "in any way" two Nevada cases. One, the *Lachman* case, is cited by the Court. The rule of those cases and its applicability to this case are also considered (R. 68, 73, 74, 75) without specific reference to the cases by name.

I. Answer to Petitioner's First Point

Petitioner's contention that the Circuit Court's holding and interpretation of section 70a permits the creation of a homestead right after bankruptcy which was non-existent before and such holding is therefore in conflict with *White v. Stump*, is based on an incorrect analysis of the Circuit Court's holding.

Petitioner's point I. in his argument (page 10) deals with the Circuit Court's interpretation of the 1938 amendment to section 70a of the Bankruptcy Act (11 U. S. C. A. 110). *White v. Stump*, 226 U. S. 310, and *Georgonses v. Gillen*, 24 F. (2d) 292, Ninth Circuit, cited by petitioner at pages 11 and 12, were both decided before the amendment. Petitioner concedes that there are no cases other than the instant case dealing with the amendment. There is, therefore, no conflict in the decisions as to the meaning of the amendment.

Petitioner contends that under the Circuit Court's decision there is apparently no definite time which can be set as determining when property actually passes to the trustee and a wide field of specualtion is thereby opened up. Such contention misapprehends the Court's decision, as the Court did not make such time indefinite. On the contrary, the Court held in discussing the amendment (R. 71):

> "We entertain no doubt that *now, as heretofore*, the necessary factual basis precedent to the exercise of the right of selection must exist *as of the date of bankruptcy;*" (Italics added.)

There is no uncertainty in section 70a, either before

or after the amendment, as to when property passes to the trustee. It provided and still provides that upon the trustee's appointment and qualification, he is vested with the bankrupt's title as of the date of adjudication of bankruptcy. The bankrupt's title to exempt property never passed to the trustee. Before the amendment this exception was stated:

> "except in so far as it is to property which is exempt,"

After the amendment it read:

> "except insofar as it is to property which is held to be exempt,"

The Circuit Court's decision created no field for speculation. As quoted above, it recognized that both before and after the amendment—

> "the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; *but there is no good reason for believing that under the present law the opportunity to identify or select exempt property is irretrievably cut off as of that date.*"
>
> (Italics added.)

It is thus clearly apparent that while the date of bankruptcy is a line of demarkation, it is a date at which the *factual basis* precedent to the exercise of the right of selection must exist. Petitioner contends directly, and by reference (page 12) to the dissent below, that the Circuit Court's decision created or would permit the creation of a homestead and homestead right after the date of bankruptcy. It appears from the above quotation and elsewhere in the opinion that the Circuit

Court did not so hold. As pointed out in the italicized portion, it is even clearer now than before the amendment that the *right to identify or select* the exempt property is not cut off by the bankruptcy.

What the Courts below in this case held was that the factual basis did exist and the wife did have the right of selection at the time of the bankruptcy.

Petitioner refers with approval (page 12) to the dissent below. With due and sincere respect to its learned author, we suggest that a straw man is being destroyed in the dissent's discussion of the majority's holding on this point. We do not understand that we are called upon to discuss the dissent in detail because of petitioner's mere reference to it. We feel that the following may, however, save time in the comparison of the two opinions.

The Circuit Court did not (as the dissent suggested that it did—R. 81, 83) hold that the homestead and the exemption right may be created after the bankruptcy.

The Circuit Court did not (as the dissent suggested it did—R. 82) hold that Congress intended to "ameliorate" the position of the wife, a third person. The Circuit Court made no reference to the wife in considering the amendment. It did refer to the wife's position in considering the Nevada law. The differentiation of *White v. Stump* is based on the differences of the Idaho law considered in that case from the Nevada law involved in the instant case.

The dissent states (R. 83) that under the majority

opinion the claimant could wait at his will to create his exemption, perhaps for years. The Circuit Court did not hold or imply that the exemption could be "created" after the date of bankruptcy. It held that the exempt property could be identified or selected after such date. As to delay, the Circuit Court did not hold that the time to so identify or select was unlimited. In fact, the Bankruptcy Act itself sets the time within which the exemptions shall be claimed (Section 7a (8), 11 U. S. C. A. 25). Such time does not, and would not, extend beyond a reasonable period for amendment of schedules. This has been and is the law.

The procedure provided by statute is for the trustee to promptly set aside the exemptions allowed by law, if claimed, and report thereon to the courts (Bankruptcy Act 47a (6), 11 U. S. C. A. 75). The question of procedure is not involved herein. The Circuit Court in this connection was merely pointing out the significance of the amendment with reference to the right of designation and as to when such designation may be made. It was not considering the existence of an exemption with relation to the time of such adjudication. In other words, the dissent is suggesting an interpretation of the amendment which may or may not be correct, but which is not necessarily opposed to the Circuit Court's interpretation.

Lastly, the dissent states (R. 83) that the Circuit Court decided that the holding of *White v. Stump* prevents the selection of barber's tools, etc., permitted by state exemption statutes. The Circuit Court did not so

decide, but held (R. 74) that if the right of designation were cut off by bankruptcy as contended by petitioner the state exemption law would be nullified. The Court then pointed out (R. 75) that such exemption statute in Nevada included the homestead (Section 8844 (15) Nevada Compiled Laws, 1929).

We have ventured the above remarks as to the dissent as we believe them relevant to petitioner's claim and the dissent's statement that the Court's decision conflicts with *White v. Stump.* (See petitioner's Reasons Relied on for the Issuance of the Writ, page 4.)

Because petitioner has cited and relies on *White v. Stump,* arising in Idaho, and *Georgouses v. Gillen* (supra), arising in Arizona, rather than because of any belief on our part that those cases are relevant to the issuance of certiorari on the basis of conflict between federal courts, we note the following, which is, however, clearly relevant to petitioner's point II. discussed below.

Both the Idaho and Arizona statutes provide that the homestead does not exist nor is it created until the filing of a formal declaration. (See above cases for statement of state law; also 5465 and 5469 Idaho Comp. Stat.; 3292 Rev. Stat. of Arizona.) Neither state has a provision such as 8844 (15) Nevada Compiled Laws, 1929, which is a self-executing exemption statute including the homestead among its *present* exemptions. Idaho and Arizona lack statutory and judicial declaration of the protected status of the wife such as has been given in Nevada. (See above references and compare with

3360, 8844 (15), 9882.112 and 9882.113, Nevada Compiled Laws 1929, *Hawthorne v. Smith*, 3 Nev. 182, *First Nat. Bank v. Meyers*, 39 Nev. 235 at 247, 150 Pac. 308 at 312, and see analyses of District Court, R. 46, and Circuit Court, R. 69, 72.) The *Georgouses* case did not involve a wife's rights, and, according to the opinion therein, the property "admittedly" had no homestead status at the time of bankruptcy. The factual basis did not exist as here.

II. Answer to Petitioner's Second Point.

Petitioner's point II (page 12) deals with the Nevada law. We have hereinabove (page 5) suggested wherein we believe petitioner's statement as to what the Circuit Court held is in error. We emphasize that correction without here repeating it. We also refer to the above citations contrasting the Idaho and Arizona statutes with those of Nevada.

Section 8844 (15) Nevada Compiled Laws, 1929, (set forth in the Appendix) provides:

> "The following property *is exempt from execution*, —— 15. And the homestead as provided for by law." (Italics added.)

Petitioner's contention is that the words "as provided for by law" mean a homestead upon which a formal declaration has been filed in accordance with Section 3315 Nevada Compiled Laws, 1929, so that if such declaration was not filed before bankruptcy, the homestead and its exemption did not exist.

The Nevada decisions and statutes show that these words do not have such significance. On rehearing of

First Nat. Bank v. Meyers, 40 Nev. 284, 161 Pac. 929, at page 930, the Court was considering the contention that the phrase "as provided by law" meant a homestead where a recorded declaration had been filed. The Court stated:

> "Respondent contends that the homestead, 'as provided by law' mentioned in the Constitution, means the homestead as recorded, and that no homestead can be effective for any purpose unless the parties claiming the same shall have first recorded their declaration."

This contention was rejected by the majority of the Court:

> "the Constitution says: 'Laws shall be enacted providing for the recording of such a homestead.' What homestead? The homestead contemplated was instituted by the law of 1865, and the homestead 'provided by (that) law' was a homestead 'consisting of a quantity of land ,together with a dwelling house thereon,"

(The homestead is so defined today in section 3315, which is the law of 1865 referred to. The section is set out in the Appendix.)

Following the above statement of the respondent's contention, the Nevada Supreme Court makes extensive citation of cases to show that it has been repeatedly held in cases involving the matter of forced sale under execution that the words such as "to be selected" have no significance where there is actual occupancy and the value and quantity is as prescribed (in other words, where the factual basis exists). The Nevada court quotes the following with approval:

> "The obvious purpose for which the selection is required is only to identify and define the property to which the exemption applies, so as to *distinguish* that which *is exempt* from that which may be sold at the instance of creditors." (Italics added.)

In addition to the Court's declaration in the Meyers case that a homestead "as provided by law" means the land and house and not a homestead which has been recorded, we call attention to Section 3360 Nevada Compiled Laws, 1929, referring to the wife's rights in the—

> "homestead as now defined by law regardless of whether a declaration thereof has been filed or not,"

Clear recognition is given to the fact that in Nevada the homestead as defined by law exists independent of recordation.

The Nevada legislature has elsewhere recognized that the homestead as provided by law does not refer just to a homestead upon which a declaration has been filed. Section 9882.112 Nevada Compiled Laws, 1929, (1941 Stats. 186) provides that the Court or judge shall set apart—

> "the homestead, as designated by the general homestead law then in force, whether such homestead has theretofore been selected as required by law, or not."

The following section (9882.113) gives a similar recognition:

> "If the whole property exempt by law be set apart, and should not be sufficient *** the district court or judge shall make such reasonable allowance ***"

In speaking of *First Nat. Bank v. Meyers* (supra) the Circuit Court comments:

> "Thus, in the situation and for the purposes contemplated by this statute, a de facto homestead right subsists in the wife independently of the filing of a declaration. We think it inescapable that if regard be had for the state law the wife, at least, is not to be surprised into the loss of the right, whether by the husband's voluntary transfer or by his or his creditor's petition in bankruptcy."

It may be stated therefore, that if, as in the instant case, the factual basis exists in Nevada before the bankruptcy, the homestead and the homestead right exist at that time. Neither the homestead nor the homestead right are created in Nevada by the filing of a formal declaration any more than they are created by a claim of exemption in bankruptcy proceedings. The Circuit Court herein held that where the factual basis exists there is no reason why the bankruptcy proceedings cut off the wife's right to identify the exempt property.

The Meyers case (supra) is of further interest in that it announces the state's policy as to protecting the wife's interest in the homestead. The Nevada Supreme Court stated:

> "It is manifest that the policy sought to be established by the legislature was one that would preclude the *possibility* of a wife being divested of the home by acts of her husband, perpetrated either with a design to defraud her, or through misguided or imprudent transactions in which she had no part." (Italics added.)

The policy of the Nevada law as to creditors is stated in *Hawthorne v. Smith*, 3 Nev. 182:

> "If, then, it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, certainly we should not hold that a creditor can defeat that policy by any act of his, unless the statute clearly gives that right."

As we have seen, Section 8844 (15) makes the homestead (that is, the house and land irrespective of any recording) presently exempt by virtue of the statutory declaration.

Nevada cases dealing with Section 8844 (all of which were decided before 1911 when subsection 15 was added) recognize that the property listed in that section was made presently exempt by the section, even though it had not been formally claimed or designated. See *Elder v. Williams*, 16 Nev. 423, *Elder v. Frevert*, 18 Nev. 446, and *Edgecomb v. His Creditors*, 19 Nev. 149. For example, in the last case, the Court held that a livery stable keeper was not one included in the terms of the statute, and stated:

> "If respondent had been engaged in a business that *entitled* him to claim the exemption, the property *would be exempt*, ***." (Italics added.)

Section 8844 was apparently passed pursuant to article I section 14, of the Nevada Constitution (set forth in Appendix). A statute similar to section 8844 and passed pursuant to a similar constitutional provision has been held to be self-executing and to exempt the homestead. *Hughes v. Newton*, 89 Fed. 213. The wife's claim of exemption was therein upheld as against the husband's creditors.

The Circuit Court's decision is not in conflict with the

two Nevada cases cited by petitioner. They were impliedly differentiated by the Court in its recognition and discussion of the fact that the homestead and the homestead right exist in Nevada (when, as here, there is the necessary factual basis) even though a designation might be necessary to prevent the exemption being lost by sale.

In addition to this, however, in *neither* of the cases (*Lachman v. Walker*, 15 Nev. 422, and *McGill v. Lewis*, 116 Pac. (2nd) 581) was section 8844 (15) before the Court nor did the Court consider it. The *Lachman* case was decided in 1880 and long before its enactment. Whatever inference may be drawn from the language of the Court as to the law at that time, it is clear that the homestead and the homestead right now exist independent of recording. This is true whether or not the actual holding of the case is still law. There is, as the Circuit Court shows, nothing inconsistent between the rule that an exemption exists and the rule that the exempt property must be designated or the right will be waived. It certainly cannot be said that the case involves the "identical question" as in this case. The Circuit Court stated the ruling of the Lachman case:

> "Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt. Lachman v. Walker, 15 Nev. 422."

A further important distinction is that in the Lachman case the levy was made *after* the property had been conveyed to plaintiffs, and plaintiffs attempted to

vitiate the sale by relying on a homestead which they claimed had been established by plaintiff's *predecessors*. There was no pretense that plaintiffs, the ones owning the property at the time of the levy, claimed the property as their own homestead. It was not a homestead in fact at that time and there had been no formal declaration filed by anyone.

The rights of a wife were not involved in the Lachman case. There has been *no* Nevada case reported where the rights of the wife who was actually residing on the premises have not been protected and the exemption allowed.

The *McGill* case is no exception. That case decided that the form and contents of the formal declaration did not comply with Section 3315 as it failed to state that the claimant was residing on the premises. There was no bill of exceptions before the court, but only the judgment roll which showed that claimants were *not* residing on the premises at the time of sale, but were residing in another county. There was, therefore, nothing on which to base an exemption. The Court expressly stated that, because of the state of the record before it, it could not consider or decide what the legal effect of further showing of fact might be. In other words, the *factual basis* for a homestead was affirmatively shown to be lacking. We have already commented that Section 8844 (15) was not before the Court. Also the same and fundamental differentiation pointed out above as to the Lachman case is equally applicable to the McGill case. The McGill case did not hold that the

property was not exempt prior to formal recordation. Apart from any other factor, the clear distinction between the existence of an exemption and the necessity of designating exempt property before sale would distinguish the McGill case from the Circuit Court's decision.

Petitioner's contention as to the trustee's position under Section 70a (5) of the Bankruptcy Act as applied to Nevada law is so completely and succinctly answered by the Circuit Court that we feel it is only necessary to refer to the opinion. (See R. 73, 74, and 71 (130 Fed. (2d) at page 777, headnote 2, and at page 777, headnote 6.)

It is to be noted that under the laws of Nevada a debtor or his wife must be given at least twenty days notice before an execution sale takes place, in which time action may be taken to protect the homestead. (Section 8846 Nevada Compiled Laws, 1929). If petitioner's contention were correct no notice or time whatsoever would be afforded the wife in any bankruptcy proceedings by or against her husband. It is undisputed that the state law controls as to exemptions.

Furthermore, under the Nevada law, at no time could the husband alone, directly or indirectly, have effectively transferred the property without the wife's signature and consent so as to defeat her homestead (3360 Nevada Compiled Laws, 1929; *First Nat. Bank v. Meyers*, supra.)

Petitioner in effect contends that, notwithstanding the

Nevada law, the law could be circumvented and her right could be defeated by the husband's voluntary or involuntary bankruptcy.

III. Answer to Petitioner's Third Point

The contentions made under petitioner's point III at page 18 have been answered by the discussion of the above points. Petitioner states his third point as follows;

> "The writ should be granted since the case of Clark v. Nirenbaum, 8 Fed. (2d) 451, does not sustain the majority opinion of the United States Circuit Court of Appeals for the Ninth Circuit."

The Clark case is cited twice by the Circuit Court (R. 71, 75; 130 Fe (2d) 778, 779). We have already pointed out that in Nevada, as in Georgia, the homestead and the homestead right exist independent of formal declaration. The Clark case holds, under the doctrine of White v. Stump, that the designation or selection of such property may be made after bankruptcy.

The facts set forth in the Statement of Case on pages 51-56 Trans. are not controverted but it should be noted that the Statement of Facts also shows that during the period when the bankruptcy petition was filed reconciliations were being attempted and it appears with reference to the decree (Trans. 54, 55) that the bankrupt was guilty of extreme cruelty toward Mrs. Matley and the community property was awarded to her.

. . ."which shall include, among other things, the

> homestead of the parties hereto occupied by plaintiff and defendant for many years as a home and claimed as a homestead, said premises being known as No. 31 Caliente Street, Reno, Nevada" . . .

This property, claimed for many years as a homestead was exempted as such by the district court and sustained by the Circuit Court. Petitioner seeks to set aside the exemption.

It was stipulated by appellee, respondent here, (Trans. p. 56) that (appellant's) petitioner's statement of facts might be included in the record on appeal. It is to be noted that at the time this stipulation was made, the Statement of Points relied upon by appellent on appeal (Trans. 57) was stated that point (1) (appellant's brief, page 8) was "the sole question involved in this appeal". The second point or question included was not added to the record until after the case had been filed in the Circuit Court. It is not referred to in the opinion of the referee nor in the opinion of the district court. It was not argued before the district court. This second point also appears as the second specification of error (appellant's brief p. 9).

ARGUMENT IN DETAIL

The conceded facts are that prior to and at the time of the filing of the petition in bankruptcy against the husband, Mrs. Matley was actually residing in her home and claiming it as a homestead (Trans. 53, 54, 55). The formal declaration of homestead was filed subsequent to the bankruptcy petition. As is necessarily conceded by (appellant) petitioner, the question is whether under the *Nevada* law the homestead was entitled to exemp-

tion as of the time the bankruptcy petition was filed against her husband.

Before discussing the Nevada law, it should be emphasized that the portion of Section 70A of the Bankruptcy Act relied upon by petitioner does no more than to vest the trustee with title of the bankrupt (Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store) to all property not exempt which "might have been levied upon and sold under judicial process against him."

As pointed out in the referee's decision, this is the only basis and the only subdivision of Section 70A under which the appellant has any possible claim. The section merely lists *what property*, other than property held to be exempt, the trustee acquires title to. It does not attempt to state the *kind of title* the trustee acquires. The trustee's position under 70A is not that of a purchaser after an accomplished judicial sale, the property having been levied on and sold. The trustee has only the rights of the bankrupt and his creditors under the Nevada law to property which is not exempt. It is respondent's contention that the property could not have been rightfully levied on and sold under judicial process against the bankrupt. Could the bankrupt or the bankrupt and his creditors have divested Mrs. Matley of her homestead rights without any opportunity by her to protect them?

The essential question is as to the status of the property at the time of the filing of the petition. Under the Nevada law, differing from the examples in other

jurisdictions cited by (appellant) petitioner, the homestead may and in this case did exist before the filing of the formal declaration. The homestead in Nevada does not require such filing to create the homestead. The homestead itself and exemption rights in it existed *at the time* of the filing of the bankruptcy petition. Except by Mrs. Matley's abandonment of her rights the bankrupt or his creditors could not have deprived her of the exemption. The (appellant) petitioner contends that the right was cut off by a filing under the federal law and in the same breath concedes that the right to exemption must be measured by the Nevada law.

Appellant refuses to recognize the distinction contended for by respondent and recognized by the district court and the Circuit Court. The exemption presently existed in Nevada and must be recognized even before any formal filing or recordation. The formal filing is no more than a notice of an existing fact. As we shall show at greater length hereafter, *White v. Stump*, 69 L. Ed. 301, relied on by appellant, dealt with Idaho law where the homestead and the exemption did not arise until such formal filing was made. The court held that it was too late to create the right after the petition was filed. We do not oppose the ruling of the White case, but, as recognized by the district court and the Ninth Circuit Court of Appeals, it is no authority to deny the exemption in the instant case.

In Nevada a homestead exists prior to a formal declaration. It has been the consistent policy of this

State throughout its history that a filing of such declaration at any time up to the very moment of sale will prevent a sale on execution. *Hawthorne v. Smith*, 3 Nev. 182, so held declaring that the law makes no reservation in favor of liens acquired before the declaration. That case also held (page 188) that the existence of debts or *actual insolvency* does not affect the right to claim the exemption. The policy of Nevada law as to creditors is stated in the Hawthorne case:

> "If, then it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, *certainly we should not hold that a creditor can defeat that policy by any act of his*, unless the statute clearly gives that right." (Italics ours.)

In the instant case the husband and his creditors through the trustee seek to claim greater rights than are allowed to creditors under the Nevada law.

The declared policy of the Nevada law is to protect the wife's interest in the homestead against wilful or improvident acts of the husband. The Nevada Supreme Court stated in *First Nat. Bank v. Meyers*, 150 Pac. 308, 312:

> "It is manifest that the policy sought to be established by the legisiature was one that would preclude the *possibility* of a wife being divested of the home by acts of her husband, perpetrated either with a design to defraud her, or through misguided or imprudent transactions in which she had no part." (Italics ours.)

In *Morrill v. Skinner*, 77 N. W. 375, Neb., the court stated:

> "Whether the title to a homestead be in husband

> or in wife, the act of one alone cannot divest it. The other has a vested interest therein which cannot be defeated by creditors, by the conveyance of the one holding the legal title, and, a priori, by the acts of that one short of conveyance."

Freeman on Executions states:

> "Husbands there have been and may again be who are inattentive to their wives and children or willfully inflict upon them misery and want. The family of such a man, more than of any other, is within the spirit and necessity of exemption laws, and it is a strange and perverse interpretation of those laws which denies their benefit, even temporarily, to a family whose head is for the moment absent from them, or who, though not absent, is indifferent to their fate."

See also *Smith v. Thompson*, 213 Fed. 335, where the court in considering a bankruptcy case states:

> "In every court the administration of an exemption law should comport with the beneficent spirit that prompted its enactment. A court of equity especially should not attempt to defeat the exemption by niceties in practice."

See also *In Re Isele*, 33 F. S. 853, 855.

As shown by the Meyers case, the bankrupt in the instant case (whose position was openly antagonistic to his wife) did not have a title which he could pass to the trustee. Such interest as he had was at all times subject to his wife's exemption right in the homestead. If (appellant's) petitioner's position were correct as to the policy of Nevada law, any husband could cut off his wife's right by, as here, failing to file a declaration and going into bankruptcy.

It is stated in *Breneman v. Corrigan*, 4 F. (2) 225 (C. C. A.) from Ore.:

> "At its present term the Supreme Court of the United States distinctly adjudged that no provision of the bankruptcy law (Comp. St. 9585-9656) interferes with a state statute regarding homesteads. White v. Stump, 45 S. Ct. 103, 69 L. Ed. —. The very purpose of the homestead laws is to secure a home and protection for husband, wife, and children against adverse fortune and should always be liberally construed."

In *Turner v. Bovee*, 92 F. (2) 891, (C. C. A.), the question arose whether a life policy containing endowment provisions was exempt in bankruptcy proceedings. The court held that the state laws are the measure of right to exemptions and that under the Washington statute (similar to our section 8844, (14) N. C. L.) life insurance was declared exempt, and that therefore it must be allowed whether it had endowment provisions or not. The court stated:

> "Restrictions not contained in the statute should not be read into judicial construction. Holden vs. Stratton, supra. On the contrary, this being an exemption statute, we should construe it liberally. Hills v. Joseph (C. C. A. 9) 229 F. 865, 869; In re Hindman (C. C. A. 9) 104, F. 331, 333."

While the cases, *First Nat. Bank v. Meyers*, 39 Nev. 234, 150 Pac. 308, 40 Nev. 284, 161 Pac. 929, and *Porch v. Patterson*, 39 Nev. 251, 156 Pac. 439, deal primarily with the right of a husband to alienate or encumber the homestead without his wife's consent and hold no such right exists, they are important in that they affirm the Nevada rule that no act of the husband or his

creditors can defeat the homestead rights of the wife. In the Meyers case the husband arranged with a creditor to, and did, execute a deed as security for a loan. Though no formal declaration had been filed, the court held that no rights were acquired by the transfer. As far as homesteads are concerned the bankruptcy law makes no differentiation between voluntary and involuntary cases. If appellant be correct, one easy way for the husband to evade the policy of the Nevada statutes and decisions would be by a voluntary petition. By a voluntary petition he could accomplish the exact thing held in the Meyers case to be contrary to the laws and policy of Nevada.

The policy of the homestead law in Nevada has been broadened and liberalized even since Hawthorne v. Smith. A homestead de facto has been consistently recognized by the cases. Such homestead is deemed to exist independent of recordation. For example, in the Meyers opinion in 161 Pac. at page 930, the court was considering respondents' contention that the phrase "as provided by law" meant a homestead where a recorded declaration had been filed:

> "Respondent contends that the homestead, 'as provided by law' mentioned in the Constitution, means the homestead as recorded, and that no homestead can become effective for any purpose unless the parties claiming the same shall have first recorded their declaration."

This contention was rejected by the majority of the court:

> "The Constitution says: 'Laws shall be enacted

providing for the recording of such homestead.' What homestead? The homestead 'as provided by law.' The homestead contemplated was instituted by the law of 1865, and the homestead 'provided by (that) law' was a homestead 'consisting of a quantity of land, together with the dwelling house thereon'."

With reference to the defacto homestead the Nevada Supreme Court, at page 311 of 150 Pacific, refers to Child vs. Singleton, an early Nevada case, wherein the court had stated that the homestead of the appellants not having been selected by a recorded declaration of the claim was, at the date of the mortgage of the husband, subject to alienation by him alone. (The Child case was decided at the same session of court and shortly after Lachman v. Walker, relied on by appellant herein.)

The court in the Meyers case then states that the Act of 1897 (3360 N. C. L.) attempts to protect the *homestead de facto* and states that the very absence of a statute similar to that enacted in 1897 was what impelled the court to hold as it did in the case of Child vs. Singleton. We find a similar explanation in the Meyers opinion at page 931 of 161 Pac. The court therein states:

"Respondent argues with great earnestness that the decision of this court in the case of Child vs. Singleton, 15 Nev. 461, is decisive of the question at bar. But we are constrained to believe from the language of that decision that had the learned and eminent jurist who drafted the opinion been confronted with the statute such as that found in the amendatory act of 1897, a different conclusion would have been arrived at."

The effect of the Meyers decision is further reaching than appellant would have the court believe. As stated in the Meyers case at page 311 of 150 Pac.:

> "By the Territorial Statute of 1861, as construed and applied by this court in the case of Goldman v. Clark, 1 Nevada 607, residence alone was sufficient to constitute a legal homestead."

Further along on the same page, the court states:

> *"The Statute of 1897 was, in effect, a re-enactment of the policy of the territorial act repealed by the Statute of 1865."*

The importance of the court's holding in these cases is emphasized by the dissenting opinion of Justice Coleman in Porch vs. Patterson.

At page 142 of 156 Pac., Justice Coleman states:

> "In considering this phase of the case, it might be well to have in mind the fact that if the amendment of 1897, supra, is valid, it works a practical return to the situation which existed before the adoption of the Constitution (when no recording was required.)"

Justice Coleman argued that the Meyers case "practically reverses the former decisions of the court, without discussing them at all." Justice Coleman argued that, under the decisions prior to the act of 1897, the homestead exemption did not arise except upon the recording of the declaration and that the decision in the Meyers case changed this. The majority of the court, including Chief Justice Norcross, now Judge of the District Court in the instant case, held that the homestead existed without recording and that the policy of the law was to protect the wife's interest.

That the enactment of 1897 affected the homestead law and gave the wife rights in the homestead independent of recordation seems obvious on the face of the act. This is certainly clear in reading the Meyers and Porch cases. Justice Coleman emphasized that the majority decision changed the law with reference to the significance of recording, pointing out that the Meyers decision and the act of 1897 "*works a practical return to the situation which existed before the adoption of the Constitution* (*when no recording was required*)." Again, on page 443, Justice Coleman refers to the law as established by the Meyers case, that "the statute of 1897 was in effect a reenactment of the policy of the territorial act repealed by the statute of 1865."

In addition to the court's clear declaration in the Meyers case that a homestead "as provided by law" means the land and house and *not* a homestead which has been recorded, we call attention to 3360 Nevada Compiled Laws, referring to the wife's rights in the

> "homestead as now defined by law regardless of whether a declaration thereof has been filed or not."

Clear recognition is given to the fact that in Nevada the homestead as defined by law exists independent of recordation.

The Nevada legislature has elsewhere recognized that the homestead as provided by law does not refer just to a homestead upon which a declaration has been filed. Statutes of 1941, page 186, Sec. 112, provide that the

court or judge shall set apart

> "the homestead, as designated by the general homestead law then in force, whether such homestead has theretofore been selected as required by law, or not."

From the foregoing it is clearly to be seen that the homestead and the wife's interest therein exist independently of and in the absence of any recording. It is likewise clear that a homestead "as provided by law" means a quantity of land with a dwelling house, and not, as contended by the appellant herein, a homestead upon which a formal declaration has been recorded.

This leads us to the effect of Section 8844 Nevada Compiled Laws, providing:

> "The following property *is exempt* from execution, . . . 15. and the homestead as provided for by law." (Italics ours.)

The addition of No. 15 is a recent change in the law, enacted in 1911 and after the decision in Lachman v. Walker. Its application was not necessary to be considered in the Meyers case and was not raised or discussed therein. It was not considered in McGill v. Lewis. The legislature apparently passed Section 8844 pursuant to Article 1, Section 14, of the Nevada Constitution (set out in appellant's brief, page 21). A statute similar to Section 8844 and passed pursuant to a constitutional provision such as Article 1, Section 14, has been held to be self-executing and to exempt the homestead. *Hughes v. Newton*, 89 Fed. 213. The important point is that Section 8844 provides that the

homestead consisting of land and house *is exempt*. It does not provide that no exemption exists until there is a recording, but that the house and land comprising the homestead are *now* exempt. The words are of present exemption. By using the phrase "as provided for by law" the legislature must be deemed to have meant a homestead consisting of a certain quantity of land and the dwelling house thereon. It is unnecessary to cite authority that this comparatively recent enactment was made by the legislature which is deemed to have in mind the former enactments on the subject and the decisions construing them. It should also be noted that, if appellant's construction were followed, not only would there be a disregard of the other statutes and the decisions, but the legislature would be credited with a vain and idle act. The unrecorded homestead is declared by the exemption statute (8844 N. C. L.) to be exempt. There is no qualification except that it be of a particular quantity of land and the dwelling house thereon.

It is also true that any other construction would do drastic harm to the purpose and reason for its enactment. Section 3360 N. C. L. declares void any mortgage or alienation of the homestead whether or not it is recorded unless both spouses join. The obvious policy of the statute, set forth in the Meyers case, was extended in Section 8844 (15) N. C. L. There would otherwise have been no purpose in the enactment of the later statute. The very thing Section 8844 (15) seeks to prevent would occur if the homestead and the

wife's interest in it could be lost, as appellant claims it should be, by the act of the husband or his creditors.

The cases concerning homestead speak of the necessity of protecting the wife against an intent of the husband to defraud her, or against claims which might arise in the hands of his creditors by reason of his acts against her interest. This is just such a case. If the appellant's view be adopted it is particularly unfair to the wife. Under any proceedings which might take place in the state courts, the wife, if confronted with an action of the husband or a claim of his creditors, could file a declaration and defeat an execution sale. This would be the case even if the appellant's view of the state law were correct. With bankruptcy proceedings, however, to which the wife was not a party, the mere filing of the petition cuts off the wife's rights if no formal declaration had been theretofore filed, according to the appellant's contention. It is a matter for very serious consideration, therefore, to determine if the Nevada law is such that the wife has no exemption right unless a declaration has been theretofore filed. It is our contention that the statutes and decisions of this state do not leave the wife thus defenseless. We say, and we have pointed out that the Nevada law differs in important particulars which remove our state from the unfortunate situation existent in the jurisdictions from which came the White and Georgouses cases relied upon by the appellant.

With reference to the policy of our laws, will the husband or his creditors be permitted to do indirectly

that which it is admitted they cannot do directly? The bankruptcy law and the decisions on homesteads do not differentiate between voluntary and involuntary bankruptcy. Under the appellant's view there is nothing to prevent the husband of depriving the wife of the homestead without her consent by filing such petition. Yet it is undeniable that it is the declared policy of Nevada to prevent such deprivation.

We hereinabove referred to *Hughes v. Newton,* 89 Fed. 213, wherein it appears that under a Constitutional provision nearly identical in wording to Nevada constitution, Article I, Section 14, the Wisconsin legislature passed an act very similar to Section 8844 (15) N. C. L. The court holds that the homestead was exempt from seizure and sale and upheld the wife's claim of exemption as against the husband's creditors. The statute was, like 8844 (15), self-executing and created a present exemption. The case of Turner v. Bovee, supra, will be recalled in this connection.

An examination of the Nevada cases dealing with Section 8844 indicate clearly that, as stated by the section itself, the property is made exempt by the statute without further action by the debtor. Subdivision 15, being a recent enactment, has not been dealt with specifically in any Nevada case.

In *Elder vs. Williams,* 16 Nev. 423, the court was considering Section 8844 (then 1282 Comp. L.). At that time the homestead was not included in the list of exempt property. The decision in the Elder case was that the fraudulent concealment of non-exempt

property equal in value to the property claimed as exempt does not deprive the debtor of an otherwise valid claim of exemption. The court was considering whether the team and horses mentioned in the statute was properly exempt in that case. The trial court instructed the jury as to a teamster that when he pointed out the animals the law would recognize and protect them as his exempt property.

On page 422, the court stated:

> "As to the property mentioned in the statute as exempt, only one exception is stated, and that is that no article or species of property mentioned in the section shall be exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon. The constitution provides that, 'the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome law, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted'."
>
> (Const. Art. I, Section. 14.)
>
> "The statute was undoubtedly passed in compliance with the constitutional requirement. Since the Statute declares that the plaintiff is entitled to hold the property in suit as exempt from execution, except in the one case stated, what right have courts to engraft upon the statute another exception? It is provided that one sewing machine not exceeding in value one hundred and fifty dollars, in actual use by the debtor, or his family, shall be exempt. All other sewing machines may be sold. He is allowed to retain one that is in actual use, because it is the policy of the constitution and law, and the interest of the state, that no citizen shall be stripped of the implements necessary to enable him to enjoy the necessary comforts of life and to carry on his usual employment; and that, if he has

> one, his family shall not be made paupers or beggars in consequence of the follies, the vices, or the crimes of their head."

The court then refers to various exemptions given, as tools of mechanics, etc., "are all declared absolutely exempt, except upon a judgment for their price."

In speaking of protection for debtors and of debtors with families,

> "The latter class is certainly included, and as to them, it is as reasonable to presume, under the statute as it is written, that one of the objects of exemption was to protect their families as it would have been, if persons without families had not been included among the beneficiaries."

An outgrowth of the above case was *Elder vs. Frevert*, 18 Nev. 446, which was suit against defendant sheriff for recovery of the wagon and horses exempt from execution together with damages for their detention. The court stated:

> "The statute *exempts* two horses and their wagon for the purpose of enabling the debtor to earn a living." (Italics ours.)

In *Edgecomb v. His Creditors*, 19 Nev. 149, the court held that a livery stable keeper is not one included in the terms of the statute:

> "If respondent had been engaged in a business that *entitled* him to claim the exemption, the property *would be exempt*, . . ." (Italics ours.)

There is no similar provision in the Idaho law considered in White v. Stump or the Arizona law considered in Georgouses v. Gillen or in the Washington law dealt with in Coopman v. Bank, cases cited by the

(appellant) petitioner. We do not understand that the case of *Clark v. Nirenbaum*, 8 F. (2) 451 (C. C. A.), is, as stated by (appellant) petitioner, in conflict with the White case. The Circuit Court, in deciding the Clark case, specifically considered the White case and basing its decision on that case determined that the homestead exemption should be allowed. The Nevada statute declares the homesteads *are* exempt. There was a present right of exemption under the Nevada law at the time of the filing of the bankruptcy petition. This fact in and of itself takes this case completely out of the holding of the White, Coopman and Georgouses cases, which were dealing with state statutes and decision different from those of Nevada. Each of these cases state the established rule that the question of the right to exemptions depends on State law. The policy, statutes and decisions of Nevada are such that the deprivation of (respondent's) Mrs. Matley's homestead exemption would be contrary to both Nevada law and the Federal bankruptcy statute.

The distinction which is recognized by Judge Norcross, the District Court Judge herein and former Chief Justice of the Nevada Supreme Court, is that under Nevada law the homestead exists and is exempt even before the filing of a declaration. As indicated in the Nevada cases just cited the exemption exists by virtue of the statute. It is true that if the debtor does nothing upon levy and permits the sale to go through he may waive the exemption. That is true as to all exemptions. Under the bankruptcy law, for example, the debtor, or, as here, his wife, may and

should point out to the court and its officials the property which is exempt. It will only be set aside as exempt upon someone's action in that regard. But that selection, whether it be by previous recordation and subsequent claim in bankruptcy, or just by the claim in bankruptcy, is not the thing which makes it exempt. It is already exempt by statute. It is appellee's position that the property must be set aside as her homestead even if there had been no Section 8844 (15). In the face of that section, however, her right must be recognized.'

It is this same distinction which is recognized in the Circuit Court decision of *Clark v. Nirenbaum*, 8 F. (2) 451, cited by the District Court in its decision herein (Trans. 50). In that case, which allowed the homestead to be set aside in the bankruptcy proceedings, though no formal application in the State had been theretofore made, the court states:

> "An exemption is the freedom of debtors from liability to seizure and sale under legal process for the payment of their debts."

In that case the bankrupts, at the time of the filing and adjudication, had not made the formal application provided for by Georgia law, but claimed the homestead exemption thereafter during the bankruptcy proceedings. The court points out that under the Georgia law the constitution and statute provide for the exemption and that it exists although the exemption itself, the setting aside, is not allowed until the application for setting apart is made. In other words, to be entitled to the benefits of the exemption an assertion of the

exemption must be made, but the right of exemption was nevertheless existent at the time of the filing of the bankruptcy petition. The court held that it made no difference "that the exemption was not ascertained or set apart until after the proceedings in bankruptcy were begun." The court goes on to say:

> "It is insisted, however, that the recent case of White v. Stump, 266 U. S. 310, 45 S. Ct. 103, 69 L. Ed. 301, is authority for the opposite view. But in the case the Supreme Court was only giving effect to the homestead exemption prescribed by the laws of Idaho, as construed by the state court of last resort. In that state a homestead does not come into existence until a declaration that the land is occupied and claimed as a homestead is made and filed for record. 'Up to that time,' says the court, 'the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition the subsequent making and filing of a declaration neither avoids the levy nor prevents a sale under it.'."

The court points out that upon the filing of a levy or attachment the debtor in Georgia may move to claim his exemption, but it does not mean that the right of exemption was not existent. It is true that the right could not be created after the filing, but that is a different thing. The court remarks that the claim and setting aside in the bankruptcy court is essentially the same thing accomplished in the state procedure. The trial court's decision allowing the exemption was affirmed:

> "The true adjustment of bankruptcy to the Georgia exemptions is to treat the filing of the petition in bankruptcy as the equivalent of a levy or attachment on all the bankrupt's property, which he may

> meet before an actual sale by having the exemptions to which he is entitled, if not previously ascertained, set apart to him by the machinery of the bankruptcy court just as he would do in the state court had state process been levied upon it."

Now the status of the homestead in Georgia and Nevada is very different from the "present" lack of a homestead right which was the situation in Arizona, Washington and Idaho prior to the filing of a declaration. In the Georgouses case, for example, relied on by appellant herein, it is stated that "when the bankruptcy was filed no part of the property had a homestead status." As we have seen, this is *not* the case in Nevada. Considering again Section 8844 Nevada Compiled Laws, the exemption statute, we have shown that the Nevada law and decisions recognize the presently exempt quality of the property listed in that section, which now includes the homestead. As in the Nirenbaum case, the statutes concerning the homestead exemption are self-executing in contemplation of the federal bankruptcy law which requires an exemption as of the time of the bankruptcy filing. The fact that such property may be thereafter set apart or pointed out does not mean that it was not exempt at the time of filing. That is the holding of the Nirenbaum case, and, in view of the difference of the laws of the various jurisdictions that case is not at variance with the White, Coopman and Georgouses cases on which (appellant) petitioner relies. It must not be forgotten that the question of whether certain property constitutes a homestead or is exempt is to be determined by the law of the particular state in which the property is situated.

In the case of *In re Friedrich*, 100 Fed. 284, C. C. A., the court was concerned with certain exemption out of partnership assets. The court held:

> "We do not think that an actual severance from the common stock of the articles claimed as exempt before petition in bankruptcy is filed is essential."

The court also commented that where the property was exempt, upon being pointed but, the severance in fact of exempt property from the general estate was to be made by the trustee, not the debtor.

But as we have said; the federal courts must follow the state law as to exemptions. Hereinabove we cited *Elder v. Williams; Elder v. Frevert*, and *Edgecomb v. His Creditors*. While those cases dealt with Section 8844, Nevada Compiled Laws, before the homestead was added to the property listed in the section, they show conclusively that the property was made presently exempt by the section, even though at any given time it had not been formally claimed as such or pointed out. The property listed in 8844 Nevada Compiled Laws is not property of the debtor which might "be levied upon and sold against him." So with the homestead in this case, it did not pass to the trustee under 70A as it was not property of the debtor at the time of filing "which might have been levied upon and sold under judicial process against him."

The Idaho law with which the White case was concerned differs fundamentally from Nevada law. As quoted by the district court herein (Trans. 46) the White case states that under Idaho law

"The exemption arises where the declaration is filed, and not before. Up to that time the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition, the subsequent making and filing of a declaration neither avoids the levy nor prevents a sale under it."

The difference in the Idaho law is emphasized by two Idaho cases cited in White v. Stump, namely Smith v. Richards and Law v. Spence. In the Smith case the court expressly refused to follow *Hawthorne v. Smith*, 3 Nev. 164, which held that a declaration of homestead filed after attachment stopped any sale. The Law case held that a mortgage lien given by the husband could not be defeated by the wife's claim that the premises were a homestead though no declaration was filed. This is contrary to the Nevada policy which is expressed in the Meyers case as: "though the homestead is not registered as required by law, the husband's sole conveyance or encumbrance of it cannot pass title." It is also to be noted that the Idaho statutes contain provisions which support the holding of the White case and which are completely foreign to Nevada law. Section 5441 Idaho Comp. Stat. 1919 provides that the premises are subject to execution or forced sale in satisfaction of judgments obtained "before the declaration of premises; or in an action in which an attachment was levied upon the premises before the filing of such declaration."

Also, as the White case remarks, the Idaho statutes provide that the declaration "must" be recorded. Section 5465 Idaho Comp. Stat. provides:

> "From and after the time the declaration is filed for record the premises therein described constitute a homestead."

Section 5469 of the Idaho statutes provide:

> "From and after the time the declaration is filed for record the land described therein constitute a homestead."

It is thus clearly to be seen that the statutes, the decisions and the policy in Idaho are radically different from those in Nevada. We have no similar statutes in Nevada. The homestead in Nevada exists before any filing of a formal declaration. Appellant (petitioner) concedes that a filing at any time before a sale will defeat the sale. In Nevada the exemption exists before any filing and after any levy even though the property may have to be claimed as exempt to enforce the exemption. These things are not so in Idaho. In Idaho the *homestead itself* and *all exemption rights* are created by the filing of a declaration and do not exist prior thereto. Taking the filing of the bankruptcy petition as the cleavage point in time, the *Idaho* law provides that, unless the formal declaration has been filed theretofore, there is no homestead and no right of exemption. We say, therefore, that while the rule of the White case is not disputed, and in fact was recognized by the district court herein and by Clark v. Nirenbaum, it is no authority for denying the exemption claim of Mrs. Matley.

In addition to the comments on *Georgouses v. Gillen* heretofore made, it should be noted that the Arizona law is in the general class of the Idaho law, in that the homestead itself and any right of exemption arises

only upon the filing of a formal declaration. That in Arizona such right may be created after the filing of a lien to defeat the lien was held not to take the case out of the rule of White v. Stump because the property had no "homestead status" prior to such filing. The district court herein further differentiates the Georgouses case (Trans. 46) by stating:

> "In the case of Georgouses v. Gillen, supra, no question of a wife's rights in property subject to a homestead status was presented."

Also Arizona does not have an exemption statute such as 8844 (15) Nevada Compiled Laws.

Apart from the necessary effect of 8844 (15) N. C. L. it should not be overlooked that the general policy of Nevada law has been steadily extended for the protection of the wife. In Lachman v. Walker decided in 1880 and cited by appellant at pages 25 and 28 the levy was made *after* the property had been conveyed to plaintiffs, and plaintiffs attempted to stop the sale by relying on a homestead which they claimed had been established by plaintiff's *predecessors.* There was no pretense that plaintiffs, the ones owning the property at the time of the levy, claimed the property as their own homestead. It was not a homestead in fact at that time and there had been no formal declaration filed by anyone. We have heretofore remarked on the fate of the Child case decided at the time of the Lachman case. Also, of course, 8844 (15) N. C. L. had not been passed at the time of the Lachman case.

There has been no Nevada case (with the possible

exception of one reversed in the Meyers case) where the rights of the wife who was actually residing on the premises have not been protected and the exemption allowed. Even in the McGill case the court was dealing solely with a judgment roll which showed a faulty declaration and the fact that the claimants resided in another county from where the premises were situated.

The position of a trustee in bankruptcy is clear. He takes no title to exempt property and exemptions are to be judged solely by the state law. He stands in the bankrupt's shoes with the bankrupt's rights and certain creditor's rights. It is admitted that no act of the husband could deprive the wife of her rights in the homestead and it is the expressed policy of the law that no act of the husband's creditors shall deprive the wife of such rights. It is interesting to note in this connection that if sufficient moneys were realized from the sale of other assets belonging to the bankrupt aside from the homestead property, the bankruptcy proceedings would be ended and dismissed and there would be no question but that the homestead property would remain intact. As expressed in *In re Carl*, 38 F. Supp. 414 and at 418 it was the policy of the bankruptcy laws to recognize and give effect to the state exemption laws; that title to property exempt under such laws does not pass to the trustee; and that the bankruptcy court has jurisdiction only for the purpose of determining if the exemption is proper and "cannot require its sale even on the petition of creditors holding a waiver or otherwise entitled to compel the application of the exempt property to the satisfaction of their

claims." Many cases are cited including Clark v. Nirenbaum.

PETITIONER'S SECOND POINT, discussed at pages 34 to 37 of his brief, filed in the Circuit Court, is a point added to the appeal record after the case was filed with the Circuit Court. It was not referred to in the opinion of the referee nor in the opinion of the district court. It was not argued before the district court. While we believe this point cannot be relied upon by petitioner we will nevertheless answer it. This second point is stated at page 34 of petitioner's brief in the lower court to be: "Whether declaration of homestead under facts stipulated was sufficient under Nevada laws."

It is to be observed that, as we have above shown, a formal filed declaration is not necessary to either create a homestead or to give it an exempt status.

Appellant's (petitioner's) statement at page 3 of his brief in the Circuit Court is misleading in saying that the facts show appellee had not been deserted or left by her husband in the matrimonial domicile at Fernley. Petitioner's statement of fact does not show this. It shows that the matrimonial domicile was the Caliente Street house, not Fernley, and that they were only temporarily at Fernley for a business venture. At the time of the filing of the petition Mrs. Matley was living in her home on Caliente Street. It does not appear where the bankrupt was staying at that time. Petitioner's contention logically followed out is that if a petition in bankruptcy happens to be filed on a day when the

husband is away from home, the homestead is not exempt. Such contention answers itself and is not the law. As to the fact that Mrs. Matley was living alone in the house at the period in question it is to be noted that appellant's (petitioner's) statement shows that reconciliations were attempted at the time and believed possible. The divorce occurred about seven months after bankruptcy. Petitioner argued that the exemption is to be considered as of the time of filing of the petition. The subsequent divorce is, of course, irrelevant as to the exemption. Temporary separations between husband and wife are not infrequent, and in contemplation of law the parties are still to be considered as residing at the family home. It does not appear where the bankrupt was during this period. Suppose he had gone to Idaho and later returned, the attempted reconciliation being successful. Would it be said he was not a resident of Nevada and the Caliente Street house for such period? Obviously not, yet there is no difference so far as this case is concerned.

Apart from this, however, the facts, if they impliedly show anything as to desertion or abandonment, show that the bankrupt's treatment of his wife was such as to justify a separation and that the cause of their separation, however temporary, was his cruelty. It is elementary law that if either party is to be considered as deserting the other, it is the one whose cruel treatment forced the separation. Hence, whatever desertion there was, was by the bankrupt. It will not be forgotten that the expressed policy of Nevada law is that

the wife shall not lose the homestead by any act of the husband.

The very same day that the bankruptcy petition was filed, the bankrupt consented that he be adjudicated a bankrupt and such order was entered that day. His treatment of Mrs. Matley was such that she was forced to seek and later secured a divorce on the ground of extreme cruelty. Around the time when the petition was filed reconciliations were believed possible and were attempted (Trans. 54). It appears from the record and was also testified in detail in connection with matters not here for consideration that the bankrupt's attitude was adverse to his wife's interests. It is from a situation such as this that the Nevada law has increasingly sought to protect the wife.

The uniform law in connection with homesteads is that conduct of the husband such as took place in the instant case will not deprive the wife of the homestead.

The homestead character of the premises was unquestionably established and was never abandoned. In this case, there was an actual return to the premises by Mrs. Matley and resumption of the residence prior to the bankruptcy and continuing thereafter. As Mrs. Matley testified (Trans. 53) as to the stay at Fernley:

> "They considered such occupancy temporary and rented the Reno property in the meantime with the intention of holding and returning to it and that at all times she and the bankrupt considered the Reno property to be their home."

The law is established that under such circumstances

as here, the temporary absence of the parties is not an abandonment of the homestead and does not deprive the claimant of the right to claim the exemption. This is recognized even in the cases cited by appellant. It has many times been said that actual occupancy does not mean constant personal presence so as to make one's residence his prison and that temporary absence does not constitute a removal or abandonment.

See the following authorities:

Foreman v. Meroney, 62 Tx. 723, 727;
29 C. J. 938, par. 355;
In re Pope, 93 Fed. 722;
Watson v. Hurlburt, 170 Pac. 541, Ore.;
Elliott v. Bond, 176 Pac. 242, Okl.;
Watterson v. E. L. Bower Co., 48 Pac. 1108;
29 C. J. 939;
Long v. Talley, 201 Pac. 990;
Weatherington v. Smith, 109 N. W. 381, 112 N. W. 566, Neb.;
Morrill v. Skinner, 77 N. W. 375 Neb.;
Grace v. Grace, 104 N. W. 969, Minn.

In *Goldman v. Clark*, 1 Nev. 607, it was argued that the renting of the premises lost the homestead rights. The court states:

> "And the fact that the husband rented out the premises for a period as a lodging house can make no difference to her. Nothing but her own deed, properly acknowledged, could divest her rights."

The homestead right is not lost even when the wife leaves the homestead when such absence is enforced by acts of the husband. The courts hold that her rights continue the same as if she had continued to stay on the

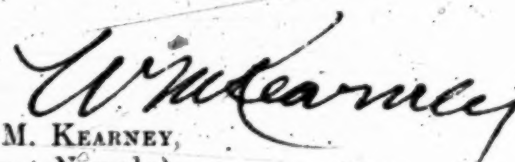
premises. *Batker v. Dayton*, 28 Wis. 367; *Keyes v. Scanlan*, 23 N. W. 570, Wis., *Sherrid v. Southwick*, 5 N. W. 1027, Mich.; *Vanzant v. Vanzant*, 23 Ill. 542; *Rogers v. Day*, 74 N. W. 190, Mich.; *Swingle v. Swingle*, 162 N. W. 912, N. D.; *Novotny v. Horecka*, 206 N. W. 110, Iowa. See also *Brown v. Brown*, 68 Mo. 388.

The courts have many times held that the husband may not consent to a decree which would forfeit the wife's rights to the homestead or to an alienation which would accomplish that result. See *Allen v. Hawley*, 66 Ill. 164; *Beecher v. Baldy*, 7 Mich. 487; *Dye v. Mann*, 10 Mich. 29; *McKee v. Wilcox*, 11 Mich. 358; *Snyder v. People*, 26 Mich. 106; *King v. Moore*, 10 Mich. 538; *LaLonde v. Bloom*, 188 N. W. 291; *Voss v. Rezgis*, 175 N. E. 799; *O'Neil v. Bennett*, 207 N. W. 543; *Beard v. Beard*, 10 Tenn. App. 52.

CONCLUSION

IN CONCLUSION, it is respectfully submitted that the judgment of the District Court in the instant case should stand as affirmed by the Circuit Court of Appeals for the Ninth Circuit.

DATED: February 23, 1943.



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APPENDIX

Section 6 of the Bankruptcy Act (11 U. S. C. A. 24) reads:

"This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however,* That no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this title for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess."

The relevant portion of Section 7 of the Bankruptcy Act (11 U. S. C. A. 25 (8)) reads:

"The bankrupt shall *** (8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their

residence, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated, or disputed; and a claim for such exemptions as he may be entitled to; all in triplicate, one copy for the clerk, one for the referee, and one for the trustee: *Provided*, That the court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses; ***"

The relevant portion of Section 47 of the Bankruptcy Act (11 U. S. C. A. 75a. (6)) reads:

"Trustees shall *** (6) set apart the bankrupt's exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; ****"

The relevant portion of Section 70 of the Bankruptcy Act (11 U. S. C. A. 110a. (5)) now reads:

"The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or the original petition proposing an arrangement or plan under this title, except insofar as it is to property

~~*which is held to be exempt,*~~ to all *** (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: ***"

(Note: The italicized portion above, prior to the 1938 amendment, read: "which is exempt,".)

The Nevada Constitution and statutes referred to are:

Nevada Constitution, Article 1, Section 14, reads:

"The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted; and there shall be no imprisonment for debt except in cases of fraud, libel or slander, and no person shall be imprisoned for a militia fine in time of peace."

Nevada Constitution, Article 4, Section 30, reads:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated, without the joint consent of husband and wife when that relation exists; but no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of the premises, or for the erection of improvements thereon; provided, the provisions of this section shall not apply to

any process of law obtained by virtue of a lien given by the consent of both husband and wife, and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

Section 3360, Nevada Compiled Laws, reads:

"The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; provided, that no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and the wife execute and acknowledge the same as now provided by law for the conveyance of real estate; provided further, that the wife shall have the entire management and control of the earnings and accumulations of herself and her minor children living with her, with the like absolute power of disposition thereof, when said earnings and accumulations are used for the care and maintenance of the family."

Section 8844, Nevada Compiled Laws, reads:

"The following property is exempt from execution, except as herein otherwise specifically provided:

"1—Chairs, tables, desks, and books to the value of two hundred dollars, belonging to the judgment debtor.

"2—Necessary household, table, and kitchen furniture belonging to the judgment debtor ***.

"3—The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also two oxen, or two horses, or two mules, ***.

"4—The tools or implements of a mechanic or artisan necessary to carry on his trade; the notarial seal, records, and office furniture of a notary public ***.

"5—The cabin or dwelling of a miner or prospector, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, ***.

"6—Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage for one or two horses, or one motor vehicle, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living ***.

"7—Poultry not exceeding in value seventy-five dollars.

"8—The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment ***.

"9—All fire engines, hooks and ladders ***.

"10—All arms, uniforms, and accouterments required by law to be kept by any person, and also one gun, to be selected by the debtor.

"11—All courthouses, jails, public offices and buildings ***.

"12—All material not exceeding one thousand dollars in value, purchased in good faith for use in the construction, alteration, or repair of any building ***.

"13—All machinery, tools and implements necessary in and for boring, sinking, putting down, and constructing surface or artesian wells; ***.

"14—All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance ***.

"15—*And the homestead as provided for by law.*

"16—The dwelling of the judgment debtor occupied as a 'home for himself and family, where said dwelling is situate upon lands not owned by him'.

"No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment to recover for its price, or upon a judgment of foreclosure of a mortgage or other lien thereon."

Section 3315, Compiled Laws of Nevada, reads:

"The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from

any court, for any debt or liability contracted or incurred after November thirteenth, in the year of our Lord one thousand eight hundred and sixty-one, except process to enforce the payment of the purchase money for such premises, or for improvements made thereon, or for legal taxes imposed thereon, or for the payment of any mortgage thereon, executed and given by both husband and wife, when that relation exists. Said selection shall be made by either the husband or wife or both of them, or other head of a family, declaring their intention in writing to claim the same as a homestead. Said declaration shall state when made by a married person or persons that they or either of them are married or, if not married, that he or she is the head of a family, and they or either of them, as the case may be, are, at the time of making such declaration, residing with their family, or with the person or persons under their care and maintenance, on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead, which declaration shall be signed by the party or parties making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants; provided, that if the property declared upon as a homestead be the separate property of either spouse, both must join in the execution and asknowledgment of the declaration; and if such property shall retain its character of separate property until the death

of one or the other of such spouses, then and in that event the homestead right shall cease in and upon said property, and the same belong to the party (or his or her heirs) to whom it belonged when filed upon as a homestead; and, provided further, that tenants in common may declare for homestead rights upon their respective estates in lands, and the improvements thereon; and hold and enjoy homestead rights and privileges therein, subject to the rights of their co-tenants, to enforce partition of such common property as in other cases of tenants in common."

The relevant portion of Section 8846, Nevada Compiled Laws, 1929, reads:

"Before the sale of property on execution, notice thereof shall be given as follows: *** 3. In case of real property, by posting a similar notice particularly describing the property, for twenty days, successively, in three public places of the township or city where the property is situated, and also where the property is to be sold; and also by publishing a copy of said notice once a week, for the same period ,in a newspaper, if there be one, in the county;***"

The relevant portion of Section 5465, Idaho Comp. Stat., reads:

"From and after the time the declaration is filed for record the premises therein described constitute a homestead."

Section 5469 Idaho Comp. Stat. reads:

"From and after the time the declaration is filed for record the land described therein is a homestead."

The relevant portion of Section 3292 R. S. 1913, Arizona (1733 Rev. Code 1928) reads:

"Exempt from time of filing. The homestead shall, from the date of recording the claim, be exempt from attachment, execution and forced sale, and from sale under any judgment or lien existing prior to the recording of such claim, ***"

SUPREME COURT OF THE UNITED STATES.

No. 540.—October Term, 1942.

G. E. Myers, Trustee of the Estate of Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Stores, Petitioner,
vs.
Verna May Matley.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 5, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner's assertion that the court below misapplied § 70(a) of the Bankruptcy Act, as amended,[1] in contravention of a decision of this court,[2] and contrary to the law of the State of Nevada, as well as a division of opinion of the judges in the court below, moved us to grant certiorari.

October 24, 1940, a petition in bankruptcy was filed against Marshall R. Matley, the respondent's husband. He appeared and consented to an adjudication which was entered the same day. November 20, 1940, the respondent filed with the Recorder of Washoe County, Nevada, her declaration claiming as a homestead a tract of land in Reno, Nevada, listed in her husband's bankruptcy schedules. November 27, 1940, she filed in the bankruptcy court a petition claiming the land as exempt. The referee denied her claim, the District Court reversed the referee, and the Circuit Court of Appeals affirmed its decision.[3] The real estate in question, acquired by the respondent and her husband while married, was community property on which a residence was built and occupied by the couple as a home. While they were absent from it at times, they always considered it their home and intended to return to it. Although they were separated in 1940, the re-

[1] Act of July 1, 1898, c. 541, § 70, 30 Stat. 565; Act of June 22, 1938, c. 575, § 1, 52 Stat. 879; 11 U. S. C. § 110.

[2] White v. Stump, 266 U. S. 310.

[3] 130 F. 2d 775.

spondent was residing on the land when the petition in bankruptcy was filed. A divorce action was pending but was not concluded until May 1941 when the respondent was granted a divorce and the Reno residence was awarded her as her sole property.

The petitioner asserts that the property cannot be set apart to the respondent as exempt since her homestead declaration was not filed, as required by State law, until after entry of the petition in bankruptcy.

Section 70(a) originally provided that the trustee shall be vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt "except in so far as it is to property which is exempt, ... ". The phraseology was altered by the amendment of 1938 to except "property which is held to be exempt, . . . ".[5] Section 6 of the Bankruptcy Act[4] declares that the provisions of the Act shall not affect the allowance to bankrupts of the exemptions "which are prescribed by the State laws in force at the time of the filing of the petition" in the state where the bankrupt has had his domicile. The trustee, as to all property in possession and under the control of the bankrupt at the date of bankruptcy, is deemed vested, as of that date, with all the rights and remedies of a creditor then holding a lien on the property by legal or equitable proceedings, whether or not such a creditor actually exists.[5] An adjudication in bankruptcy is not the equivalent of a judicial sale, nor is the trustee given the rights of a purchaser at such a sale.

The question thus arises whether the respondent's right of homestead under Nevada law, secured by her filed declaration, prevails against the right and title of the trustee. The court below so held and we think its judgment was right.

I. We conclude that the new phraseology in the amendment of § 70(a) does not alter the principles applicable to the exemption of homestead property in bankruptcy. On the face of the legislation the intent of Congress was merely to clarify the meaning of the section. We are referred to no legislative history indicating that the alteration was intended to work a change of substance. Under the amendment, as under the original provision, a homestead is exempt if, under the state law, it would be held to be exempt.

4 30 Stat. 548, 11 U. S. C. § 24.

5 § 70(c); 52 Stat. 881; 11 U. S. C. § 110 c.

White v. *Stump*, *supra*, involved a homestead exemption claimed pursuant to the law of Idaho, under which the declaration of homestead was required to be executed and acknowledged, like a conveyance of real property, and filed for record. The exemption arose when the declaration was filed and not before. Up to that time the land remained subject to execution and attachment like any other land; and where a levy was effected while the land was in that condition the subsequent making and filing of a declaration neither avoided the levy nor prevented a sale under it.[6] It appeared that no declaration was made and filed of record until a month after Stump's petition and adjudication in bankruptcy. The declaration was then made and filed by his wife for his and her joint benefit. This court held that the Bankruptcy Act fixed the point of time which is to separate the old situation from the new in the bankrupt's affairs as the date when the petition is filed; that when the Act speaks of property which is exempt, and rights to exemption, it refers to that point of time,—namely, the point as of which the general estate passes out of the bankrupt's control and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The court said: "The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is under the state law a present right of exemption—one which withdraws the property from levy and sale under judicial process."[7] Accordingly it was held that, as the claim of exemption was not perfected until after the petition was filed, it was ineffective as against the trustee, as it would have been against a creditor then having a levy on the property. If the law of Nevada respecting homestead exemptions were like that of Idaho, or operated in the same way, *White* v. *Stump* would be in point.

3. The Nevada Constitution, Art. 4, Sec. 30, reads in part:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated, without the joint consent of husband and wife, when that relation exists; . . . and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

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[6] White v. Stump, *supra*, p. 311.

[7] White v. Stump, *supra*, p. 313.

Section 3315 of the Compiled Laws of Nevada defines property which may be claimed as exempt as a homestead and permits selection by either the husband, the wife, or both, by a declaration of intention in writing to claim the same. After providing what the declaration shall contain and that it shall be signed, acknowledged, and recorded as conveyances of real estate are required to be acknowledged and recorded, the statute continues: ". . . from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants".

Section 8844 provides that "the following property is exempt from execution, . . . the homestead as provided for by law."

Historically, and under the theory of the present Act, bankruptcy has the force and effect of the levy of an execution for the benefit of creditors to insure an equitable distribution amongst them of the bankrupt's assets.[8] The trustee is vested not only with the title of the bankrupt but clothed with the right of an execution creditor with a levy on the property which passes into the trustee's custody.

Our question then is whether, under the constitution and statutes of Nevada, a declaration of homestead would be effective as against a creditor to prevent a judicial sale of the property if made and recorded after levy but before sale thereunder. If it would, it must be equally effective as against the trustee, whose rights rise no higher than those of the supposed creditor and attach at the date of the inception of bankruptcy.

Examination of the Nevada cases relied on by the court below satisfies us that the settled law of the State entitles the debtor to his homestead exemption if the selection and recording occurs at any time before actual sale under execution.[9] And indeed the petitioner so concedes in his brief, stating that he "admits that under the laws of Nevada as interpreted by the Nevada Supreme Court, a declaration of homestead filed at any time prior to actual execution sale is sufficient to establish the homestead right."

In conformity to the principle announced in *White* v. *Stump* that the bankrupt's right to a homestead exemption becomes fixed at the date of the filing of the petition in bankruptcy and cannot thereafter be enlarged or altered by anything the bankrupt may

[8] Remington, Bankruptcy, 4th Ed., pp. 4-6; In re Youngstrom, 153 Fed. 98, 103-4, and cases cited.

[9] Hawthorne v. Smith, 3 Nev. 182; McGill v. Lewis, 116 P. 2d 381.

do, it remains true that, under the law of Nevada, the right to make and record the necessary declaration of homestead existed in the bankrupt at the date of filing the petition as if would have existed in case a levy had been made upon the property. The assertion of that right before actual sale in accordance with State law did not change the relative status of the claimant and the trustee subsequent to the filing of the petition. The federal courts have generally so held and have distinguished *White* v. *Stump* where the state law was similar, in terms or in effect, to that of Nevada.[10]

The judgment is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[10] In re Trammell, 5 F. 2d 326; Clark v. Nirenbaum, 8 F. 2d 451; McCrae v. Felder, 12 F. 2d 554. *Contra*: Georgouses v. Gillen, 24 F. 2d 292.